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No. (1)

Supreme Court, U.S.
FILED

07-345 AUG 17 2007

OFFICE OF THE CLERK

In the Supreme Court of the United States

Rick D. Lamb and Susan L. Story,
Petitioners,

-v-

Commissioner of Internal Revenue
Respondent.

On Petition for A Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

Rick D. Lamb
Petitioner of Record
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503-369-5060

QUESTIONS PRESENTED

I. When the U.S. Tax Court grants itself subject matter jurisdiction in a case, then hears the case as a small tax case, does 26 U.S.C. §7463(b), which states that a decision by the U.S. Tax Court in a small tax case is not reviewable "in any other court" prohibit any court from reviewing whether the U.S. Tax Court had proper jurisdiction in the case?

II. Does a person waive a challenge to the U.S. Tax Court's jurisdiction by petitioning the Tax Court under the small tax statute 26 U.S.C. § 7463?

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In the Supreme Court of the United States

No:

Rick D. Lamb and Susan L. Story,
Petitioners.

v.

Commissioner of Internal Revenue
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. Opinions and Orders Below

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported. The U.S. Court of Appeals for the Ninth Circuit Orders, and Judgments are listed in the Appendix.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The Ninth Circuit granted respondent's motion to dismiss on 3/19/07. (App. V). Petitioners filed a motion to reconsider on 3/27/07. The Ninth Circuit filed its final order on 5/23/07 dismissing Petitioners appeal.(App. VI).

III. STATEMENT OF THE CASE

Petitioners petitioned the U.S. Tax Court then moved to dismiss due to lack of jurisdiction. The Respondent (C.I.R.) did not file an opposing motion.

The Tax Court held it had jurisdiction, then heard the case as a small tax case.

Petitioners filed an interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit challenging the U.S. Tax Court's jurisdiction to hear the case. The Ninth Circuit dismissed Petitioner's challenge citing the bar from review provided by 26 U.S.C. § 7463.(App. I) Additionally, the Ninth Circuit noted that their review was not appropriate because the decision of the Tax Court was not a final decision.

Consequently, once the Tax Court's decision became final Petitioners again appealed to the Ninth Circuit to review whether the Tax Court had subject matter jurisdiction in this case.(App. III)

The U.S. Court of Appeals for the Ninth Circuit held that it could not review Petitioner's subject matter jurisdiction challenge, because it was barred from doing so by 26 U.S.C. § 7463 and dismissed Petitioner's appeal.(App. V)

Petitioners filed a motion to reconsider.

The Ninth Circuit denied this motion and filed its final order on May 23, 2007. (App. VI)

IV. REASONS WHY THE SUPREME COURT SHOULD GRANT THE WRIT

A. This Court previously provided guidance on challenges to a Federal Court's subject matter jurisdiction.

Petitioner's only issue on appeal, on the record, (App. *infra* I-VI), was that the U.S. Tax Court lacked subject matter jurisdiction to hear the case. The Ninth Circuit never addressed this issue.

Previously, this Court held that challenges to a federal court's subject matter jurisdiction cannot be waived and may be raised at any time. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

Despite this Court's above guidance, the Ninth Circuit twice held it lacked jurisdiction to review Petitioner's issue that the U.S. Tax Court lacked subject matter jurisdiction to hear this case. This is in direct conflict with this Court's holding. *Supra*.

This Court noted that nothing any party can do can confer jurisdiction upon a federal court. *Supra* at 702.

Consequently, Petitioner's petition to the Tax Court could not confer jurisdiction upon that court. *Supra* at 708.

This Court noted that no party can waive a Federal Court's subject matter jurisdiction. *Supra* at 702.

Therefore, a petition to the Tax Court does not waive Petitioner's right to challenge the Tax Court's subject matter jurisdiction. *Supra* at 708.

However, the Ninth Circuit reasoned that § 7463 barred any court, presumably even this Court, from reviewing the Tax Court's decision granting itself jurisdiction.

26 USCS § 7463 states:

> § 7463. Disputes involving $ 50,000 or less.
>
> (a) In general. In the case of any petition filed with the Tax Court for a redetermination of a deficiency where neither the amount of the deficiency placed in dispute, nor the amount of any claimed overpayment, exceeds--.....
>
> *(b) Finality of decisions. A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any other court and shall not be treated as a precedent for any other case. (emphasis mine).*

The Ninth Circuit's holding infers that a person waives a subject matter challenge when the Tax Court hears the case as a small tax case under § 7463.

But, § 7463 does not grant the Tax Court jurisdiction in any case or issue. Rather, § 7463 presumes that the Tax Court has proper jurisdiction to hear the case.

B. 26 U.S.C. § 6213 defines the U.S. Tax Court's jurisdiction, not § 7463.

A valid notice of deficiency and a timely petition are prerequisites to the jurisdiction of the Tax Court.

(a) Time for filing petition and restriction on assessment

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. .....

.....The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed. 26 U.S.C. §6213.

Thus, if §6213 is not satisfied then the Tax Court lacked jurisdiction and § 7463 is moot.

C. This Court should grant the Writ to give governance to the U.S. Court of Appeals for the Ninth Circuit

Previously, the Ninth Circuit held that the Tax Court, like any federal court, is a court of limited jurisdiction. *Estate of Branson v. Comm'r*, 264 F.3d 904, 908 (9th Cir. 2001); *Crawford v. C.I.R.*, 266 F.3d 1121 (9th Cir. 2001). Continuing, the Ninth Circuit noted the Tax Court may exercise jurisdiction only to the extent authorized by Congress. *Branson*, 264 F.3d at 908.

"The Tax Court's jurisdiction is defined and limited by Title 26 and it may not use general equitable powers to expand its jurisdictional grant beyond this limited Congressional authorization. It may exercise its authority only within its statutorily defined sphere." *Id.*; *see also: Clapp v. Commissioner*, 875 F.2d 1396, 1399 (9th Cir. 1989) ("Congress has granted the Tax Court very narrow, limited jurisdiction.").

Concerning jurisdiction, the Ninth Circuit previously held that challenges to a federal court's subject matter jurisdiction cannot be waived and may be raised at any time. *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003).

Here, the Ninth Circuit's decision departs from this Court's, and its own, previous holdings. Allowed to stand, the Ninth Circuit's holding creates a waiver to a challenge of a Federal Court's subject matter jurisdiction. This Court's guidance is needed.

V. Conclusion

For the foregoing reasons, this Court should grant Petitioner's petition for a writ of certiorari and set this matter for briefing.

Respectfully submitted:,

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APPENDIX

UNITED STATES TAX COURT
Washington, DC 20217

RICK D. lamb and SUSAN L. STORY, Petitioners	)	
	)	Docket No. 10051-04S
v.	)	
COMMISSIONER OF INTERNAL REVENUE Respondent	)	

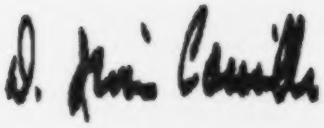
ORDER

This case was heard at the Court's trial session at Portland, Oregon, on February 8, 2005. At trial, petitioners filed a motion to dismiss on the ground that respondent is barred by the statute of limitations. Petitioners' 1999 and 2000 income tax years are at issue. 1~e notice of deficiency, upon which this case is based, is dated March 24, 2004, which petitioners admittedly received. Thc petition was filed within 90 days from the date of the notice of deficiency. Petitioners contend that their authorized power of attorney never received a copy of the notice of deficiency. At trial, the parties stipulated that, for the year 1999, petitioners executed two IRS Forms 872, Consent to Extend the Time to Assess Tax, wherein petitioners consented to an extension of the period for assessment of taxes for their 1999 tax year to April 15 i 2004. No IRS Form 872 was executed for petitioners' 2000 tax year. The notice of deficiency proposes deficiencies against

petitioners for both years 1999 and 2000 and was mailed to petitioners prior to April 15, 2004. Both IRS Porms 872 were offered into evidence and are part of the record.

Under section 6501 of the Internal Revenue Code, respondent is allowed 3 years after an income tax return is filed to issue a notice of deficiency. However, prior to expiration of the 3-year period for assessment, the taxpayer and the IRS, under section 6501(c) (4), may consent to extend the period of limitations, which is what the parties agreed to in this case by virtue of the Forms 872 that were offered into evidence with respect to petitioners' 1999 income tax return. The notice of deficiency was issued prior to the extended date for the year 1999 and prior to the 3-year period from the date the income tax return for the year 2000 was filed. Under section 301.6501(b}-l, Income Tax Regs., the tax return is deemed to have been filed on the last
day such return was due to be filed, even though in fact the return may have been filed prior thereto. The notice of deficiency in this case was timely issued by respondent for both years 1999 and 2000. The Court rejects petitioner9' argument that respondent's failure to issue a copy of the notice of deficiency to petitioners' agent bars this Court from jurisdiction of this case. Petitioners admittedly received the notice of deficiency and timely filed their petition within 90 days. It is, therefore

ORDERED that petitioners' motion to dismiss, filed on February 8, 2005, is denied.



D. Irvin Couvillion
Special Trial Judge

Dated: Washington, D.C.
May 17, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICK D. LAMB; et al.,
Petitioners,
v. COMMISSIONER OF INTERNAL
REVENUE, Respondent.

No. 06-71694
Tax Court No. 10051-04S

JUDGMENT

Upon Petition to Review a Decision of the
United States Tax Court

This cause came on to be heard on the Transcript of the
Record from the United States Tax Court and was duly submitted.
On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the United States Tax Court in this cause be, and hereby is DISMISSED for lack of jurisdiction.

Filed and entered Friday, August 11,2006

(Mary M.SCHROEDER, Chief Judge; Stephen R. REINHARDT, Michael D. HAWKINS; Circuit Judges)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCTOBER 12, 2006

CATHY A. CATTERSON
CLERK, US COURT OF APPEALS

RICK D. LAMB; et al., Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 06-71694
IRS No. 10051-04S

ORDER

Before: SCHROEDER, Chief Judge, REINHARDT and HAWKINS, Circuit Judges.

The motion for reconsideration is denied. See 9th Cir. R. 27-10. No further filings shall be accepted in this closed case.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICK D. LAMB; et al.,
Petitioners,
V.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 06-73981
Tax Court No. 10051-04S

JUDGMENT

Upon Petition to Review a Decision of the
United States Tax Court

This cause came on to be heard on the Transcript of the Record from the United States Tax Court and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the United States Tax Court in this cause be, and hereby is **DISMISSED for lack of jurisdiction.**

Filed and entered Monday, March 19,2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAY 23 2007
CATHY A. CATIERSON, CLERK
U.S. COURT OF APPEALS

RICK D. LAMB; et al., Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 06-73981
IRS No. 10051-04S
District of Oregon, Portland

ORDER

Before: CANBY, TROTT and FISHER, Circuit Judges.

The appellant has filed a petition for review, which was improperly filed because U.S. Tax Court No. 10051-04S is already the subject of this appeal. Accordingly, the petition for review is construed as an addendum to the motion for reconsideration.

The motion for reconsideration is denied. *See* 9th Cir. R. 27-10.

No further filings shall be accepted in this closed case.

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